IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1663

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, *ET AL.*,
Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION, AND BREWERY WORKERS PENSION FUND, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 591 F.2d 953. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The decision of the court of appeals was issued on January 10, 1979. On February 27, 1979, the court of appeals denied a timely petition for rehearing. The petition for a writ of certiorari was filed on May 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a).

QUESTIONS PRESENTED

1. Whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001 *et seq.*, which supersedes "all State laws" as of January 1, 1975, but does not do so "with respect to any cause of action" arising before that date, controls a dispute over enforcement of a pension fund merger agreement which

(a) was signed in August 1973,

(b) was repudiated in a letter sent in February 1974,

(c) became the subject of a decree of specific performance in litigation in the New York state courts commenced in May 1974,

(d) was initially approved by the Internal Revenue Service in November 1976, and

(e) was further enforced by order of a New York state court in April 1977.

2. Whether the Pension Benefit Guaranty Corporation ("PBGC") has discretion under Section 208 of ERISA, 29 U.S.C. §1058, to defer its regulation of the merger of multiemployer pension plans until it and other interested government agencies have issued regulations interpreting and implementing that provision and others related to it.

STATUTES INVOLVED

Section 208 of ERISA, 29 U.S.C. §1058, provides:

Mergers and consolidations of plans or transfers of plan assets

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the

merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). This paragraph shall apply in the case of a multiemployer plan only to the extent determined by the Pension Benefit Guaranty Corporation.

Section 514 of ERISA, 29 U.S.C. §1144, provides:

Other laws

Supersedures; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Construction and application

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to

be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except

as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

STATEMENT

Petitioners ("the Teamsters Fund") instituted this action in January 1977 seeking a declaratory judgment that a merger of two multiemployer pension funds, which had been formally agreed upon in August 1973, was unlawful under Sections 208 and 1015(*1*) of the Employee Retirement Income Security Act of 1974 ("ERISA"). Named as defendants in the lawsuit were the Pension Benefit Guaranty Corporation ("PBGC"), the government corporation responsible for administering various aspects of ERISA, and the other party to the merger agreement, the Brewery Workers Pension Fund ("the Brewery Fund"). On cross motions for summary judgment, the district court dismissed the complaint on the grounds (1) that the claim made by petitioners in the federal action could have been asserted by them in litigation over the validity of the merger agreement that had been conducted in the New York state courts between 1974 and 1977 and was, therefore, barred by the doctrine of *res judicata* (Pet. App. 13a-16a), and (2) that ERISA did not apply to this dispute because both the agreement to merge and the Teamsters Fund's breach of that agreement had occurred before the date of ERISA's enactment (Pet. App. 16a-17a). The court of appeals affirmed on the latter ground, citing specifically the language of Section 514(b)(1) of ERISA, which exempts from the clause declaring that "any and all State laws" are to be superseded by ERISA "any cause of action which arose, or any act or omission which occurred, before January 1, 1975." The court of appeals concluded that since the Teamsters Fund repudiated the merger agreement before January 1, 1975, the anticipatory breach gave rise to the "cause of action" defined by Section 514(b)(1) (Pet. App. 8a-11a).

The underlying facts were undisputed and may be briefly summarized:

1. *The merger agreement and its repudiation.*

On August 7, 1973, the Teamsters Fund and the Brewery Fund — both of which were multiemployer pension funds operated and administered in New York — signed an agreement to merge. The agreement provided for the integration of the Brewery Fund into the Teamsters Fund after ratification of the transaction by the employees participating in the Brewery Fund and upon receipt of a favorable determination by the IRS concerning the merger's tax consequences.

The agreement was executed, on behalf of the Teamsters Fund, by all of that Fund's trustees. The Teamsters Fund trustees, like the Brewery Fund trustees, viewed the merger as a means of spreading the risks of uncertain future events — particularly possible declines in future employment or other similar economic events affecting the level of contributions being made to the two funds.

The employees covered by the Brewery Fund approved the merger in November 1973. Shortly thereafter, the owners of the Rheingold Brewery, located in Brooklyn, N.Y., announced that the brewery's operations would be terminated. This meant that one of the two largest sources of prospective contributions on behalf of brewery employees to the joint fund would be removed. The Teamsters Fund trustees then wrote to the Brewery Fund on February 12, 1974, advising that, in light of the changed circumstances, the Teamsters Fund had "decided not to proceed with the proposed integration."[1]

[1]In January 1976 — almost two years after the Teamsters Fund letter repudiating the agreement — the F & M Schaefer Brewing Corporation also closed its New York operations. This prospect was not known to the parties in 1974 and the Teamsters Fund did not rely on it in its letter or in much of the subsequent New York litigation.

2. *Litigation in the New York courts.*

The Brewery Fund sued for specific performance in a New York state court shortly after the merger agreement's repudiation. In September 1974, while the state suit was pending in the trial court, ERISA was enacted. Many of the Act's provisions became effective on January 1, 1975. The Teamsters Fund did not, however, raise ERISA as a defense in any form in the state trial court. It relied solely on the argument that the closing of the Rheingold Brewery constituted a change in economic circumstances excusing performance of the merger agreement.

The state court rejected this defense and granted summary judgment to the Brewery Fund. The court's decree, entered on May 1, 1975, consisted of a declaration that the merger agreement was "a valid agreement and . . . binding and enforcible upon the parties thereto." It also contained an order directing the Teamsters Fund and its trustees to "(i) specifically perform the Integration Agreement and (ii) execute such documents that may be necessary in order to request approval from the Internal Revenue Service pursuant to the provisions of the Integration Agreement."

On appeal from this judgment, the Teamsters Fund first invoked ERISA. Its brief to the New York Appellate Division cited an ERISA provision prohibiting specified transactions by a benefit plan and its trustees (Section 406(b)(2) of the Act, 29 U.S.C. §1106(b)(2) (1976)) and contended that the trustees were "constrained from proceeding to perform the agreement." The Appellate Division summarily affirmed the lower court's judgment. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 49 A.D.2d 755, 374 N.Y.S.2d 590 (App. Div., 2d Dept. 1975). Leave to pursue a further appeal to the New York Court of Appeals was denied on February 10, 1976, 38 N.Y.2d 709, 346 N.E.2d 558, 382 N.Y.S.2d 1028.

3. *Efforts to secure federal intervention.*

After the New York courts had resolved the litigated issues concerning enforceability of the agreement and while proceedings were pending for further enforcement of the merger agreement, the Teamsters Fund attempted to have the PBGC intervene in this dispute. By letters dated March 24, 1976, and April 29, 1976, counsel to the Teamsters Fund requested the PBGC to assert "preemptive authority" over the proposed merger, citing the alleged violation of Sections 208 and 1015 of ERISA.[2] The communications also urged the PBGC to intervene directly in the concluding stages of the New York litigation, referring to "grave apprehension" that Teamsters Fund officials might soon be subject to contempt proceedings for refusing to obey the state court's prior judgment.

4. *The PBGC response.*

In a one-page letter dated June 4, 1976, the PBGC, through its General Counsel, refused to take the measures

[2]Both sections concern mergers and consolidations of benefit plans or transfers of plan assets. Section 208 prohibits a plan from merging, consolidating, or transferring its assets

> unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation or transfer (if the plan had then terminated).

Section 1015 denies favorable tax treatment to plans that engage in transactions not meeting this standard. Both of these sections apply to "multiemployer plans," as they are defined in 29 U.S.C. §1002(37), "only to the extent determined by the Pension Benefit Guaranty Corporation." It is not disputed that the Teamsters Fund and Brewery Fund are "multiemployer plans" within the meaning of the Act.

requested by the Teamsters Fund, citing two separate reasons. The pertinent portion of the letter stated:

> We have determined that we cannot take the steps you propose. The Department of Labor and the Internal Revenue Service have not yet issued regulations explicating and implementing §208 with respect to single employer plans. In these circumstances, we have not yet issued regulations determining the extent to which §208 applies to [mergers] with or among multiemployer plans. Consequently, as Mr. Delevett advised you, our position is that §208's limitation on mergers is not yet in effect with respect to multiemployer plans. In any event, §514(a) of the Act, which we assume you believe gives us the "preemptive authority" to which you refer, does ". . . not apply with respect to any cause of action which arose, or any act or omission which occurred before January 1, 1975." Act §514(b)(1). The April 16, 1975 court opinion, which you supplied, states that ". . . on February 12, 1974, the trustees of the Teamsters Fund, by letter, informed the trustees of the [Brewery Workers] pension fund that they had voted not to proceed with the proposed integration." It thus appears that the cause of action upon which the State court's decree of specific performance is based arose prior to January 1, 1975. Therefore, in light of §514(b)(1), we do not believe that the Act confers any authority on us to interfere in this matter. For these reasons, we decline to intervene.

5. *Further enforcement of the merger agreement.*

After the refusal of New York's highest court to consider the merits of Teamsters Fund's challenge to the merger agreement, application for a tax ruling was made to the Internal Revenue Service. In November 1976, initial approval

of the merger was obtained from the IRS.[3] Thereafter, the Brewery Fund moved for enforcement of the New York judgment, and, on April 12, 1977, a supplemental order declaring that the merger was to be deemed effective as of December 31, 1976, was issued. A stay pending appeal was denied, and, after its trustees were held in civil contempt, the Teamsters Fund finally merged with the Brewery Fund.

A related class action was also filed on January 11, 1977, in the United States District Court for the Western District of New York. *Cicatello v. Brewery Workers Pension Fund*, 434 F.Supp. 950 (W.D.N.Y. 1977). Brought by alleged representatives of the Teamsters Fund's participants and beneficiaries, the suit sought a declaratory judgment, as well as preliminary and final injunctive relief, prohibiting the merger. Reliance was put on numerous ERISA provisions, of which the foremost was Section 208. A motion to dismiss this suit was granted in June 1977, and the dismissal was affirmed without opinion by the Court of Appeals for the Second Circuit. 578 F.2d 1366 (2d Cir. 1978).

On January 19, 1977, the present action was begun. The district court denied the Teamsters Fund's requests for preliminary injunctive relief against execution of the New York judgment. With both parties filing motions for summary judgment and agreeing that the material facts were not in issue, the district court thereafter granted summary judgment for the PBGC and the Brewery Fund. That decision was affirmed by a unanimous court of appeals.

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[3]The petition advises that because of a procedural flaw — failure to give notice to interested parties — the application has been "remanded" to the IRS' regional office (Pet., p. 10). The timing of the IRS approval is, in our view of the case, irrelevant to the issues presented here. Consequently, the present status of the IRS application should not affect this Court's action on the petition.

ARGUMENT

This case concerns an unusual dispute which, on account of its unique facts and its singular timing, presents a question of law that is not likely to recur. The primary legal issue — whether the controversy between the Teamsters and Brewery Funds over the enforceability of their agreement to merge was a "cause of action which arose . . . before January 1, 1975" so as to exempt it from the supersedure provision of ERISA — was correctly decided by the court of appeals. There is no need for further review by this Court. And a subsidiary question — whether the PBGC is empowered by ERISA to defer implementation of its supervisory jurisdiction under Section 208 — presents an alternative ground for sustaining the judgment below. The view expressed in the PBGC's letter of June 4, 1975, is entirely correct, and it is consistent with decisions of this Court.

1. In enacting ERISA, Congress established a comprehensive regulatory scheme for private pension plans. In order to give federal regulation full effect, Congress provided, in Section 514(a) of the Act, for broad preemption of "any and all State laws" in the field, and defined "state laws" in Section 514(c)(1) to cover all conceivable grounds for judicial decision. Congress then fixed January 1, 1975, as the date on which this displacement of state law would take place. Recognizing, however, the potential hardships necessarily accompanying such a wide-ranging change in the legal rules governing pension plans, Congress also provided in Section 514(b)(1) that state law could continue to govern "any cause of action which arose, or any act or omission which occurred, before January 1, 1975."

In keeping with this plain language, the court of appeals properly inquired whether a "cause of action" to enforce the merger agreement between the Teamsters Fund and the Brewery Fund had arisen prior to January 1, 1975. The progress of the litigation in New York's courts was itself

conclusive proof that a "cause of action" had arisen. Hence the courts below were obligated to conclude, as the PBGC had done, that the merger agreement's enforceability would continue to be determined by state law even after ERISA's effective date. To rule otherwise and to have federal law control this pre-1975 dispute simply because the merger could not finally be implemented until after 1975 would render Section 514(b)(1) nugatory. If Congress had intended to supersede state law as of January 1, 1975, irrespective of when a challenger's claim had arisen or when the acts in question took place, the concluding sentence of Section 514(a) would have been sufficient to achieve that objective. Section 514(b)(1) was added so that federal agencies and courts would examine the underlying claim and determine, precisely as they did here, whether the challenge had been ripe for judicial adjudication prior to January 1, 1975. In that case, the dispute must be governed by state law, as the court below properly held.

2. There is no substance to petitioners' contention that the decision of the court of appeals conflicts with rulings of this Court which have applied federal statutes to contracts or other legal arrangements which were concluded before the effective date of the federal laws (Pet., pp. 13-15). Congress plainly has the power to subject to federal regulation all unexecuted pension fund merger agreements, but it simply did not do so in enacting ERISA. It exempted challenges, such as the one made by the Teamsters Fund, which had arisen before January 1, 1975.

The cases cited by petitioners concerned the question whether a legislative body has the constitutional power to enact legislation divesting persons of preexisting contract rights. For instance, in *Fleming v. Rhodes*, 331 U.S. 100, 106 (1947), upon which petitioners place heavy reliance, this Court defined its "sole inquiry" as being whether the lower court's decision "invade[d] the constitutional right of the landlord appellees to retain the fruits of their 'vested

rights' in the valid judgments." Likewise, language quoted by petitioners (Pet., pp. 15-16) from *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467 (1911), is taken from the portion of the Court's opinion which held that Congress could constitutionally pass legislation divesting individuals of a preexisting contract right to free passes on a railroad.

No comparable issue is presented by this case. The question decided below was not whether Congress *could* constitutionally have directed that the enforceability of the merger agreement be determined by reference to ERISA, but rather whether Congress *actually* intended ERISA to govern. The court of appeals resolved this issue by applying statutory language which plainly expressed the legislative intent.[4]

Moreover, the interpretation given to Section 514(b)(1) by the court of appeals in this case is consistent with the view taken by other courts throughout the country. In *Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d 888, 893 (1st Cir. 1978), the Court of Appeals for the First Circuit stated (citations omitted):

> The most natural reading of [§514(b)(1)] is that state substantive law continues to apply to causes of action that arose prior to 1975. Several courts in fact have assumed or suggested that §1144 therefore precludes federal jurisdiction over pre-1975 causes of action.

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[4]Nor are petitioners correct in stating that *Fleming v. Rhodes*, 331 U.S. 100 (1974), and *Brewing Corp. of America v. Cleveland Trust Co.*, 185 F.2d 482 (6th Cir. 1950), involved the application of provisions analogous to Section 514(b)(1) to "contexts nearly identical to the case at bar" (Pet., p. 16, n.10). The exemption clause involved in both of these cases was Section 18(3) of the Price Control Extension Act of 1946, which contained no exemption for "causes of action" arising prior to its enactment, and which was held in both cases not to exempt conduct which occurred after the date of the Price Control Act's enactment even if the agreement underlying the transaction was concluded during an exempted period.

And in *Bacon v. Wong*, 445 F.Supp. 1189 (N.D. Cal. 1978), a case cited by petitioners as support for their view of the statute, the district judge explained that "Section 514(b)(1) preserves state law in two situations, when the cause of action arose before January 1, 1975, and when the act or omission occurred before January 1, 1975." He then applied it literally to the California cause of action at issue in that case.[5]

Nor is there substance to petitioners' assertion that the court of appeals' alleged "misapplication" of the doctrine of anticipatory breach warrants review by this Court (Pet., pp. 17-20). Whether or not the Teamsters Fund's February 1974 repudiation of the merger agreement was sufficient to give rise to a "cause of action" in light of the additional precondition that IRS approval be secured is not a question of general importance warranting consideration by this Court. Indeed, it appears to be entirely an issue of New York law, which the New York courts resolved against the Teamsters Fund implicitly when they entertained the action for specific performance and granted relief to the Brewery Fund, and then explicitly in the course of enforcing that judgment. *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, 62 A.D.2d 1046, 404 N.Y.S.2d 158 (1978).[6]

[5]The other cases cited by petitioners (Pet., p. 16) provide no support for — and in most instances contradict — their interpretation of Section 514(b)(1). This Court's brief observation in *Malone v. White Motor Corp.*, 435 U.S. 497, 499 n.1 (1978), that "ERISA disclaims any effect with regard to events before [January 1, 1975]," is wholly consistent with the decision below. *Reuther v. Trustees of Trucking Employees Fund*, 575 F.2d 1074, 1078 (3d Cir. 1978), and *Keller v. Graphic Systems of Akron, Inc.*, 422 F.Supp. 1005, 1008 (N.D. Ohio 1976), applied §514(b)(1) literally, as did the court below. See also *Finn v. Chicago Newspaper Publishers' Association - Drivers Union Pension Plan*, 432 F.Supp. 1178 (N.D. Ill. 1977).

[6]This decision is reproduced as Appendix A to this Brief in Opposition, pp. 1a-6a, *infra*.

3. In any event, the ground not reached by the court of appeals (Pet. App. 6a, n. 6) was a proper alternative basis for the PBGC's refusal to grant petitioners' request. Sections 208 and 1015(*1*) of ERISA, on which petitioners rely to invalidate the merger, apply to multiemployer pension plans "only to the extent determined by the Pension Benefit Guaranty Corporation." With this language, Congress deliberately left to the discretion of the PBGC the timing and extent of any regulation of multiemployer plans under Section 208.

On October 29, 1975 — several months before the Teamsters Fund requested PBGC intervention in its dispute with the Brewery Fund — the Department of Labor, the Internal Revenue Service, and the PBGC announced in a public release that Section 208 would not be implemented immediately with regard to multiemployer plans. See Appendix B, pp. 7a-8a, *infra*. This was done because application of the "benefit equivalence test" prescribed by the Act is dependent on the termination insurance program established by Title IV of the Act (29 U.S.C. §4021, *et seq*) and because that test presents complex accounting questions which require substantial evaluation and consideration by experts of the three agencies involved.[7] Hence the PBGC determined, in coordination and after consultation with other responsible government agencies, that it would be unsound to attempt to apply Section 208 to multiemployer plans on a merger-by-merger basis, and that a carefully constructed regulatory foundation should be a prerequisite. The rejection of petitioners' request to in-

[7]Because benefit plans frequently divide participants into separate categories, set varying benefit formulas, and carry their assets in varying forms, the PBGC has already had to issue four detailed regulations on the subject of measuring benefits to which plan participants are entitled upon termination. See 29 C.F.R. §2605 (1975); 41 *Fed. Reg.* 48480 (to be codified as 29 C.F.R. §2608); 41 *Fed. Reg.* 48484 (to be codified as 29 C.F.R. §2610); 29 C.F.R. §2611 (1976).

tervene was a proper application of this policy judgment, which Congress had assigned to the agency.

The precise language of the concluding sentence of Section 208 supports the PBGC's authority to implement such a judgment. Congress did not direct that the statute be applicable generally to mergers of multiemployer plans with only such *exceptions* as the PBGC might specify. Nor did it direct that the PBGC was to evaluate *every* multiemployer merger by this or any other standard. Rather, it assigned the judgment of initiating general rules or particular case-by-case applications to the agency created by the Act, and declared that the statutory formula was to apply "only to the extent" that the agency chose to apply it. This broad statutory delegation gave the PBGC the discretionary power to withhold totally any application of the statutory formula until the general framework for regulation could be resolved among that agency and other interested government bodies. Such a judgment is entirely within the expert agency's delegated powers. See, *e.g.*, *Batterston v. Francis*, 432 U.S. 416, 424-425 (1977); *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318-319 (1958).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 5, 1979

APPENDIX A

BREWERY WORKERS PENSION FUND et al., Respondents,

v.

NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND et al., Appellants.

Supreme Court, Appellate Division,
Second Department.

April 24, 1978.

MEMORANDUM BY THE COURT.

In an action for specific performance of an agreement to integrate two pension funds and for a judgment declaring that said agreement is valid and binding, in which action a judgment and order (one paper) was entered in favor of plaintiffs upon the granting of their motion for summary judgment, defendants appeal from an order and supplemental judgment (one paper) of the Supreme Court, Queens County, entered April 12, 1977, which granted plaintiffs' motion to supplement the judgment and order and, *inter alia*, determined that the pension funds have been integrated since December 1, 1976.

Order and supplemental judgment affirmed, with $50 costs and disbursements.

This appeal concerns the efforts of plaintiffs-respondents to enforce an agreement with defendants-appellants, entered into on or about August 7, 1973, whereby the Brewery Workers Pension Fund (Brewery Fund) and the New York State Teamsters Conference Pension and Retirement Fund (Teamsters Fund) were to be integrated. The agreement was to become effective 30 days after the parties were notified of Internal Revenue Service approval, and upon its ratification by a majority of the participating employees.

The brewery workers ratified the agreement in November, 1973. However, in February, 1974, the attorney for the trustees of the Teamsters Fund notified the attorneys for the trustees of the Brewery Fund that, in view of an alleged decline in the number of participating brewery workers, the Teamsters trustees had voted not to proceed with the agreement.

In July, 1974 plaintiffs commenced this action seeking a declaration that the agreement was valid and binding upon the Teamsters trustees, as well as specific performance. The Teamsters trustees defended on the ground of economic hardship.

On September 2, 1974, while this matter was pending, Congress passed the Employee Retirement Income Security Act (ERISA) (U.S. Code, tit. 29, § 1001 et seq.), which, by its terms, was to pre-empt the field as of January 1, 1975 (see ERISA, § 514, subd. [a]; U.S.Code, tit. 29, § 1144, subd. [a]).

Plaintiffs' action proceeded without defendants raising any defense based upon the ERISA. On April 29, 1975 summary judgment was granted in favor of plaintiffs. The agreement was declared valid and binding and specific performance was ordered. On September 29, 1975 this court unanimously affirmed the judgment and order entered thereon (*Brewery Workers Pension Fund v. New York State Teamsters Conference Pension & Retirement Fund*, 49 A.D.2d 755, 374 N.Y.S.2d 590).

Plaintiffs then applied for approval of the Internal Revenue Service, which they received on September 28, 1976. Thereafter, the Brewery Fund trustees attempted to assign the assets of their fund to the Teamsters Fund, in accordance with the agreement. Defendants refused to accept the assignment and, in January, 1977, plaintiffs moved for a supplemental judgment enforcing the previous judgment and order of the Special Term.

It was then that defendants, for the first time, raised the defense that the merger would violate section 208 of the

ERISA (U.S.Code, tit. 29, § 1058) because it would dilute the benefits which participants in the Teamsters Fund would receive.

On January 11, 1977, six days after plaintiffs moved for enforcement, certain beneficiaries and/or participants of the Teamsters Fund commenced a class action in the United States District Court for the Western District of New York against both the Brewery Fund and the Teamsters Fund, alleging, among other things, that the merged plan did not comply with section 208 of the ERISA (see *Cicatello v. Brewery Workers Pension Fund*, D.C., 434 F.Supp. 950).

Meanwhile, defendants had apparently written to the General Counsel of the Pension Benefit Guaranty Corporation (PBGC) asking that the corporation intercede in this matter pursuant to the authority granted it by the ERISA. The PBGC refused on the ground that since it had not yet promulgated regulations determining the extent to which section 208 applied to multi-employer plans, that section did not yet apply to such plans.

In response to that refusal, defendants commenced an action against the PBGC and the Brewery Fund in the United States District Court for the District of Columbia (*New York State Teamsters Conference Pension & Retirement Fund v. Pension Benefit Guaranty Corp.*, No. 77-0100), seeking a declaration that the provisions of the ERISA were applicable and an injunction directing the PBGC to act with respect to the merger.

On April 12, 1977 an order and supplemental judgment granting plaintiffs' motion for enforcement was entered in this action. The Judge indicated that he was bound by the law of the case.

On June 17, 1977 the District Court for the Western District of New York dismissed the complaint in *Cicatello* holding, *inter alia*, in accordance with the PBGC position, that since no regulations had been promulgated with respect to section 208 of the ERISA, that section did not yet apply to multi-employer plans.

On August 22, 1977 the District Court for the District of Columbia granted summary judgment in favor of defendants therein, holding, alternatively, that (1) the Teamsters Fund was barred by the doctrine of *res judicata* from raising the ERISA at the Federal level because it could have and should have raised the issue in the State Supreme Court and (2) since the agreement to merge, the breach by the Teamsters Fund, and the cause of action all occurred or arose prior to the enactment of the ERISA, the court would not interfere because the ERISA could not be applied retroactively.

Finally, on March 14, 1978, the United States Court of Appeals for the Second Circuit afrirmed the judgment of the District Court in *Cicatello,* relying generally on the District Court's opinion, but also noting the ruling of the District Court for the District of Columbia on the Teamsters Fund's challenge to the PBGC's interpretation of section 208.

Defendants argue before this court that the State courts are without jurisdiction because section 502 (subd. [e], par. [1]; U.S.Code, tit. 29, § 1132, subd. [e], par. [1]) of the ERISA provides for exclusive jurisdiction in the United States District Courts over all civil actions brought under Title I of the ERISA by participants and/or beneficiaries of pension plans. We do not agree.

This action was commenced in July, 1974, about two months prior to the enactment of the ERISA, and almost six months prior to its effective date (see ERISA, § 514, subd. [a]). The subsequent enactment of the Federal statute could not oust the State court of jurisdiction. The ERISA itself provides that the pre-emption of Title I does not apply to any cause of action which arose prior to January 1, 1975. The fact that plaintiffs were required to bring a supplemental proceeding to enforce the judgment because of defendants' failure to comply with the earlier decision can mandate no different result. The present application was based upon the same facts as supported the original complaint.

Defendants sought to raise in the Special Term, and seek to raise here, various issues regarding the applicability of the ERISA in general, and section 208 in particular, to the agreement in dispute. However, as plaintiffs correctly point out, defendants are barred from raising those issues by the doctrine of *res judicata.*

The original judgment and order was entered almost four months after the effective date of the ERISA. Consequently, defendants could have raised the ERISA defenses prior to its entry, but inexplicably failed to do so. That judgment and order satisfies all the elements of *res judicata:* a final judgment on the merits, involving the same cause of action and the same parties as are involved in the supplemental proceeding. Accordingly, defendants are barred from further litigating these issues. We note in passing that the District Court for the District of Columbia reached the same conclusion.

Even if the original judgment and order is not entitled to *res judicata* effect, defendants would still be collaterally estopped from raising the ERISA defenses in the enforcement proceeding because of the prior disposition of those defenses at the Federal level. The District Court for the District of Columbia held that the ERISA could not be applied to this agreement because to do so would be to apply the act retroactively without statutory authority. The District Court for the Western District of New York held that section 208 of the ERISA could not be applied to this agreement because of the absence of regulations from the PBGC which are required for its implementation. Consequently, all of the ERISA issues which defendants sought to raise at Special Term have already been decided.

We find without merit defendants' argument that the doctrines of estoppel must yield in this case to a supervening change of law. As we noted, the change in the law occurred at such a time that defendants could have presented their claims in the original action. Defendants have had their day in court.

On this view of the facts, we are not required to reach defendants' remaining contentions, and we do not do so.

APPENDIX B

NEWS RELEASE
PBGC 76-12

PENSION BENEFIT GUARANTY CORPORATION
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FOR RELEASE: Wednesday, October 29, 1975

THREE AGENCIES ANNOUNCE POSITIONS ON EFFECT OF ERISA ON MERGERS, CONSOLIDATIONS OR TRANSFERS OF ASSETS OR LIABILITIES OF MULTIEMPLOYER PENSION PLANS

The Pension Benefit Guaranty Corporation (PBGC), the Department of Labor (DOL) and the Internal Revenue Service (IRS) jointly announced their positions with respect to the application of Sections 208 and 1015 of the Employee Retirement Income Security Act of 1974 (ERISA), to multiemployer pension plans prior to the time that PBGC makes a determination of the extent to which these Sections will apply to multiemployer plans. These Sections deal with the merger, consolidation, or transfer of assets or liabilities of pension plans.

Section 208 of ERISA provides that a pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after the date of ERISA's enactment unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). A parallel provision is found in Section 414 (1) of the Internal Revenue

Code, added by Section 1015 of ERISA. Section 401 (a)(12) of the Internal Revenue Code, added by Section 1021(b) of ERISA, provides that a trust shall not constitute a qualified trust unless the plan of which it is a part contains a provision to this effect.

Section 208 of ERISA is administered by DOL and Section 1015 of ERISA by IRS. However, the last sentence of each of these Sections authorizes PBGC to determine the extent to which these Sections are to apply to multiemployer plans. PBGC intends to issue a determination of the extent to which Sections 208 and 1015 of ERISA will apply to mergers, consolidations or transfers of assets or liabilities between two or more multiemployer plans or between a single-employer plan and a multiemployer plan, including the withdrawal of an employer from a multiemployer plan where the withdrawing employer establishes a new plan or becomes a contributor to another plan. In the case of such plans, it is the current position of PBGC, DOL and IRS that until PBGC issues a determination dealing with the applicability of these Sections, the restrictions of these Sections are inapplicable, and that when such a determination is issued, its provisions will have only prospective application. However, where a single-employer plan transfers a part of its assets or liabilities to a multiemployer plan, with respect to those employees who remain in the single-employer plan, it is the position of IRS that the provisions of Sections 401(a)(12) and 414(1) apply as of their respective effective dates.

Section 4043(a) and (b)(8) of ERISA require a plan administrator to notify PBGC within 30 days after he knows or has reason to know that there has been a merger, consolidation, or transfer of assets of a defined benefit pension plan covered by Title IV of ERISA. This obligation applies with respect to both single and multiemployer plans and is *not* deferred pending the issuance of a determination by PBGC under Sections 208 and 1015. Consequently, such an occurrence remains a reportable event, which must be reported to PBGC by the plan administrator.
